SUPREME COURT OF THE UNITED STATES.

No. 210.—October Term, 1927.

David H. Blair, Commissioner of Internal Revenue, Petitioner, *vs.* Oesterlein Machine Company.	On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[November 21, 1927.]

Mr. Justice Stone delivered the opinion of the Court.

This is a proceeding brought in the Supreme Court of the District of Columbia under § 1025 (a) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 348; U. S. C., Title 26, § 1258) to compel the Commissioner of Internal Revenue to respond to a subpoena of the Board of Tax Appeals issued under § 900 (i) requiring him to answer interrogatories, and to furnish information contained in the tax returns of twelve corporations. The Commissioner denied the authority of the Board to require a response to the subpoena. A decree upholding the jurisdiction of the Board and ordering the Commissioner to obey was affirmed by the Court of Appeals of the District [17 Fed. (2d) 663]. The case is here on certiorari. — U. S. —.

Respondent corporation returned and paid excess profits taxes for the years 1918, 1919 and 1920. In the final determination of these taxes the Commissioner considered together the returns for all three years. He reduced the 1918 tax, increased the 1919 tax, and found the net balance as a deficiency. In fixing the amount of the tax for 1918 the Commissioner, as requested by the taxpayer in an amended return for that year, made a special assessment under §§ 327 and 328 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1093) but decided that no grounds existed for a special assessment for the year 1919, and so determined the tax for that year using the ordinary assessment method provided by §§ 301, 311 and 312.

The invested capital of the corporation taxed is one of the necessary factors in the computation of the tax under those sections.

In evident anticipation that in some cases the Commissioner might find it difficult or impossible to ascertain the invested capital or that in the disturbed economic conditions left by the war the tax in some cases might be harsh in comparison with others, a special method of assessment for those cases (enumerated in § 327) was provided by § 328. These sections, printed in the margin,[1] authorize the computation of the excess profits tax on the basis of a comparison with the data contained in the tax returns of other corporate taxpayers similarly situated.

Respondent, on appeal to the Board of Tax Appeals, assailed the determination of the Commissioner on the ground that although the 1918 tax had been assessed under § 328 the standard of comparison applied was erroneous and resulted in an excessive assessment, and on the ground that the tax for 1919 should have been assessed under § 328. As to the latter contention it set up that as the Commissioner had been unable satisfactorily to determine respondent's invested capital for 1917 and 1918, he could not have

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[1]Sec. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

Sec. 328 (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of

done so for 1919, and that, since the net income for 1919 was abnormal, its profits tax, if assessed by the ordinary method, would be found excessive compared with the tax assessed on other representative corporations.

The subpoena called for information concededly relevant to these contentions and was properly issued if the Board of Tax Appeals had authority to make the inquiry. The Commissioner denies generally that any determinations made by him under §§ 327 and 328 may be appealed, and in any case objects that the appeal as to the year 1918 was not properly taken.

The appeal was authorized if at all by § 900 (e) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 337; U. S. C., Title 26, § 1216) under § 274 of that Act. Section 274 permits an appeal by the taxpayer only if "the Commissioner determines that there is a deficiency in respect of the tax" which has been returned. "Deficiency" is defined by § 273 as "(1) The amount by which the tax imposed . . . exceeds the amount shown as the tax by the taxpayer upon his return; . . . (2) If no amount is

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the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

. . . . .

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

shown as the tax by the taxpayer on his return, . . . then the amount by which the tax exceeds the amounts previously assessed . . . as a deficiency. . . ."

It is argued that although there was a deficiency for 1918 and 1919, as considered together by the Commissioner, the years must be treated separately in determining whether a deficiency existed within the meaning of § 274, for purposes of appeal. So treated there was no deficiency in the year 1918, since the Commissioner had reduced the amount of the tax returned and paid for that year. This argument was rejected in Appeal of E. J. Barry, 1 B. T. A. 156, and the Commissioner appears formally to have announced his acquiescence in its rejection. Int. Rev. Cum. Bull. IV-2-1.

We think the question suggested is not properly before us. It was not specifically raised on the record before the Board or either court below and, so far as appears, was not considered by any of them. We were asked to grant certiorari only to pass upon the question whether the Commissioner's determinations under §§ 327 and 328 may be appealed to the Board of Tax Appeals. This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan* v. *United States*, 274 U. S. 95. There are specially cogent reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government. Hence we do not pass upon this aspect of the case with respect either to the return or the amended return for 1918, and our decision is without prejudice to the disposition of the question wherever appropriately presented.

The Commissioner's objection that as to both years the Board of Tax Appeals is without authority to review his action is based not on any limitations to be found in the sections of the act defining the jurisdiction of the Board, but upon the peculiar provisions of §§ 327 and 328 themselves. These, it is argued, vest in the Commissioner the exercise of a judgment and discretion in their nature not subject to appellate review. It is pointed out that by § 327 assessments in the manner provided in § 328 are permitted "where the Commissioner is unable to determine" the invested capital of the taxpayer, or where "the Commissioner is unable satisfactorily to determine" the value of a mixed aggregate of tangible and intangible property paid in as capital, or where the Commissioner

"finds and so declares of record that the tax if determined without benefit of this section" would, owing to abnormal conditions work a hardship on the taxpayer. And it is urged that this phraseology, evidences an intention to make his decision final. The conclusion is said to be fortified by the confidential nature of the returns of taxpayers with which comparison must be made in order to make the assessment under § 328. Their privileged character is thought to preclude a construction of the appeal statute that would result in giving publicity to tax returns and confidential information so carefully guarded by other provisions of the revenue acts.

But there is no inherent impossibility or, indeed, serious difficulty in reviewing judicially any determination authorized by §§ 327 and 328. The determination is to be made upon prescribed and ascertainable data and is to conform to standards set up by the statute, all defined with sufficient definiteness and clarity to be susceptible of judicial scrutiny. We cannot assume that it is to be either arbitrary or unrelated to the appropriate data in the Commissioner's office, or that he is more qualified to make it than the Board established to review his decisions. An examination of the sections creating the Board and investing it with power can leave no doubt that they were intended to confer upon it appellate powers which are judicial in character. Not only is it required by § 900 (e) to hear and determine appeals taken under § 274, which in terms allows an appeal in every case where a deficiency is found by the Commissioner, but it is empowered to administer oaths and to compel the attendance of witnesses and the production of documents and records. It may investigate anew the issues between the government and the taxpayer and upon the determination of the appeal it may affirm, set aside or modify the findings and decision of the Commissioner. In the light of such provisions there is plainly no sufficient ground for reading into § 274, allowing an appeal wherever a deficiency is found by the Commissioner, an exception based on the supposedly sacrosanct character of his determinations under §§ 327 and 328.

But little weight can be given to the suggestion that the Board's appellate powers are limited by the section of the Act prohibiting the publication by collectors of information gained in the course of their duties. § 1018, reënacting § 3167 of the Revised Statutes (U. S. C., Title 18, § 216). The prohibition is limited to

disclosures made "in any other manner than may be provided by law." It cannot be deemed to forbid disclosures made in obedience to process lawfully issued in a judicial or quasi-judicial proceeding, as has, indeed, been recognized by the Treasury Department itself in Treasury Decision No. 2962, directing that copies of returns may be furnished for the government's use as evidence in court. Neither the statute nor the practice of the Department suggests the existence of any governmental policy with respect to the use of the returns as evidence in any way inconsistent with the provisions of the statute authorizing the Board of Tax Appeals to hear appeals and conduct proceedings which are judicial in character.

As we do not pass upon the question whether the Board of Tax Appeals had jurisdiction of the appeal, except insofar as it is involved in our decision that the determinations of the Commissioner under §§ 327 and 328 are subject to review by the Board, the decree will be so modified as to be without prejudice to the petitioner's presenting in any appropriate manner to the Board or the Supreme Court of the District the questions whether the Board of Tax Appeals had in other respects jurisdiction of the appeal as to the tax for 1918 and, if not, to what extent the information called for by the subpoena is relevant and admissible upon the hearing of the appeal as to the tax for 1919.

Affirmed as modified.

A true copy.

Test:

Clerk, Supreme Court, U. S.